Supreme Court, U. S.
FILED
JUL 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-167

MILDRED WATTS,

Petitioner

V.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

HOWARD I. LEGUM, ESQ.
LOUIS B. FINE, ESQ.
FINE, FINE, LEGUM & FINE
720 LAW BUILDING
NORFOLK, VIRGINIA 23510

COUNSEL FOR PETITIONER,
MILDRED WATTS

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW ..... | 1 |
| JURISDICTION ..... | 1 |
| QUESTIONS PRESENTED FOR REVIEW ..... | 2 |
| STATUTES INVOLVED ..... | 3 |
| STATEMENT OF THE CASE ..... | 4 |
| REASONS FOR GRANTING THE WRIT ..... | 6 |
| CONCLUSION ..... | 8 |
| CERTIFICATE OF SERVICE ..... | 9 |

TABLE OF AUTHORITIES

STATUTES


| | Page |
|---|---|
| SECTION 63.1-182, Code of Virginia ..... | 3 |
| SECTION 63.1-172, Code of Virginia ..... | 3 |
| SECTION 63.1-55.1, Code of Virginia ..... | 4 |


CASES


| | |
|---|---|
| NUGENT v. NUGENT, 156 Va. 753, 159 SE. 185 (L931) . | 6 |




IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. _____

MILDRED WATTS,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

Petitioner, Mildred Watts, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia.

OPINIONS BELOW

There were no opinions delivered in the Courts below.

JURISDICTION

The date of the judgment of the Supreme Court of Virginia was May 5, 1977. No re-hearing was requested. No order was entered granting an extension of time in which to petition for

certiorari. The statutory provision believed to confirm this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I. Was the refusal of the trial Court to permit Dr. Harry E. Sutelan, Jr., to testify a violation of the due process of the Fourteenth Amendment to the United States Constitution?

II. Was the refusal of the trial Court to dismiss the criminal warrant for lack of evidence and faulty description of the State statute a violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

III. Did the trial Court's conclusion, before petitioner offered any evidence, in ruling on her motion to strike the Commonwealth's evidence, that it was going to continue the case generally for one year, would put petitioner in jail for contempt of Court if she has people living in her home and she has no license, and would impose the maximun jail time, a violation of the process clause of the Fourteenth Amendment to the



United States Constitution?

STATUTES INVOLVED

The statute involved is Section 63.1-182, Code of Virginia, as amended to wit:

> "Any person ... who operates or engages in the conduct of a home for adults without first obtaining a license as required by this article ... shall be guilty of a misdemeanor."

Another statute involved is Section 63.1-172, Code of Virginia, as amended to wit:

> "Definitions.--The following terms whenever used or referred to in this article, shall have the following meanings, unless a different meaning clearly appears from the context:
>
> "A. 'Home for adults' means any place, establishment, or institution, public or private, including any daycare center for adults, operated or maintained for the maintenance or care of four or more adults who are aged, infirm or disabled, except (1) a facility or portion of a facility licensed by the State Board of Health or the State Hospital Board, but including any portion of such facility not so licensed, and (2) the home or residence of an individual who cares for or maintains only persons related to him by blood or marriage."

"B. 'Maintenance or care' means the protection, general supervision and oversight of the physical and mental well-being of the aged, infirm or disabled individual."

A third statute involved is Section 63.1-55.1, Code of Virginia, as amended to wit:

"Each local board is authorized to provide, subject to supervision of the Commissioner and in accordance with ruled prescribed by the State Board, protective services for persons who by reason of advanced age or impaired health or physical disability, cannot, unaided, take care of themselves or their affairs, and when such a person has no relative able, available and willing to provide guidance, supervision or other needed care. The authority to provide such services shall not limit the right of any individual to refuse to accept any of the services so offered. (1974, c. 329.)"

The due process clause of the Fourteenth Amendment of the United States Constitution is involved.

STATEMENT OF THE CASE

Dr. Harry Sutelan, Jr., a general practioner practicing for the past 50 years in Virginia, examined the five (5) adults who lived at the petitioner's home on May 13, 1976 at the premises. The Court refused to permit the doctor to



testify. The written results of Dr. Sutelan's findings on the day of his examination were introduced into evidence as part of the record (Tr. 99-102, 103, Exhibit D-3).

The warrant charged petitioner of operating a rest home in the City of Norfolk, Virginia in violation of Section 63.1-182, Code of Virginia. The statute makes it an offense to operate a home for adults, not a rest home in violation of the statute.

The only evidence offered by the Commonwealth to show that there were four or more adults who were aged, infirm or disabled was the testimony of Sergeant Cameron of the Norfolk, Virginig, Police Department that several of the adults appeared to be elderly, offered no medical evidence as to the mental or physical condition of the adults in petitioner's home.

The trial Court, before the petitioner offered any kind of evidence, in considering the motion to strike the Commonwealth's evidence, remarked that it is going to continue the case generally for one (1) year and would hold petitioner in contempt if

she had any people in her home without having a license and would give her maximun jail time (Tr., pt 63). Each of these questions was raised in the petition for appeal in the Supreme Court of Virginia under the questions involved on appeal.

REASONS FOR GRANTING THE WRIT

I. Refusal to permit the doctor of medicine to testify that he examined the five (5) adults a month after the arrest and that they appeared to be physically and mentally capable of caring for themselves violated the due process clause of the Fourteenth Amendmant to the United States Constitution. The Commonwealth failed to produce any medical evidence as to the physical and mental condition of those five (5) adults. The issue whether four (4) or more adults were aged, infirm or disabled was a defense that the petitioner relied on Dr. Sutelan whose testimony was not admitted by the trial Court. His testimony was relevant. Nugent v. Nugent, 156 Va. 753, 159 SE. 185 (1931).

II. Due process was violated by refusal to



dismiss the warrant for lack of evidence and faulty description of the statue.

The sole testimony of the Commonwealth as to the four (4) adults being either aged, infirm or disabled was the testimony of a police officer that several appeared to be elderly, was not sufficient to support the conviction. Annie Fink was only 55 years old and testified she was able to care for herself. Lewis Westbrooke was 63 with no health problems. Luke Williams, age 61, was in good condition. There were only five (5) adults on the premises of the petitioner.

III. The conclusion of the trial Court to continue the case generally, after petitioner was in jeopardy, and that the Court was going to hold petitioner in contempt if she had people living on the premises and had no license and would impose a maximum jail sentence, violated the due process clause of the Fourteenth Amendmant of the United States Constitution.

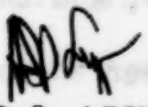
The trial Court heard the case without a jury. By making its ruling before petitioner put on her

evidence, the Court was prejudging the evidence; in effect, found the petitioner guilty before she offered any evidence. Petitioner had a right to have the Court reserve its ruling and withhold any ruling until she put on her evidence. The effect of the Court's ruling before she put on any evidence, at the close of the Commonwealth's evidence, was to deny petitioner due process.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted and that the judgment of the Supreme Court of Virginia should be reversed, with direction either to dismiss the warrant or award the petitioner a new trial.

Respectfully submitted,



HOWARD I. LEGUM and LOUIS B. FINE
Counsel for Mildred Watts

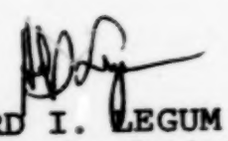
Fine, Fine, Legum & Fine
720 Law Building
Norfolk, Virginia 23510

Counsel for Petitioner



## CERTIFICATE OF SERVICE

Pursuant to Rule 33, paragraph 3 (b), I certify that service was made on the respondent Commonwealth of Virginia by depositing three printed copies of the Petition for Certiorari in a United States mail box, with first class postage prepaid, addressed to Joseph Campbell, Commonwealth's Attorney for the City of Norfolk, Virginia, counsel of record for respondent, at his post office address of 800 E. City Hall Avenue, Norfolk, Virginia 23510, this 29TH day of July, 1977.



HOWARD I. LEGUM
Attorney for Petitioner,
a member of the bar for
the Supreme Court of the
United States

Supreme Court, U. S.
FILED
OCT 27 1977
MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

October Term, 1977

No. 77-167

MILDRED WATTS,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

ANTHONY F. TROY
*Attorney General of Virginia*

ALAN KATZ
*Assistant Attorney General*

Supreme Court Building
Richmond, Virginia 23219

## TABLE OF CONTENTS


*Page*

OPINION BELOW ..... 1

JURISDICTION ..... 1

QUESTIONS PRESENTED

I. Whether The Refusal Of The Trial Court To Permit Dr. Harry E. Sutelan, Jr. To Testify Was A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution? ..... 2

II. Whether The Refusal Of The Trial Court To Dismiss The Criminal Warrant For Lack Of Evidence And A Faulty Description Of The State Statute Was A Violation Of The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution? ..... 2

III. Did The Trial Court's Conclusion, Before The Petitioner Offered Any Evidence, In Ruling On A Motion To Strike The Commonwealth's Evidence, That It Was Going To Continue The Case Generally For One Year, And Would Put The Petitioner In Jail For Contempt Of Court If She Had Individuals Living In Her Home Without A License And, Further, Would Impose The Maximum Jail Time For Such A Violation, A Violation Of The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution? ..... 2

STATEMENT OF THE CASE ..... 2

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

I. The Refusal Of The Trial Court To Permit Dr. Harry E. Sutelan, Jr. To Testify Is Purely A Matter Of State Law And Is Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution. 3

*Page*

II. The Refusal Of The Trial Court To Dismiss A Criminal Warrant For Lack Of Evidence And Faulty Description Of The State Statute Was Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution. ..... 5

III. The Trial Court's Conclusion, Before Petitioner Offered Any Evidence, In Ruling On Her Motion To Strike The Commonwealth's Evidence, That It Was Going To Continue The Case Generally For One Year, Would Put Petitioner In Jail For Contempt Of Court If She Had People Living In Her Home And Had No License, And Would Impose The Maximum Jail Time Was Not A Violation Of The Due Process Claue Of The Fourteenth Amendment To The United States Constitution. ..... 8

CONCLUSION ..... 9

CERTIFICATE OF SERVICE ..... 10

## TABLE OF CITATIONS

### Cases

Faust v. North Carolina, 307 F.2d 869 (4th Cir. 1962) ..... 4

Garner v. Louisiana, 368 U.S. 157 (1961) ..... 8

Gerstein v. Pugh, 420 U.S. 54 (1975) ..... 6

Glasser v. United States, 315 U.S. 60 (1941) ..... 7

Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960) ..... 4

Moore v. Illinois, 408 U.S. 786, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972) ..... 4, 8



*Page*

Thompson v. Louisville, 362 U.S. 199 (1960) ..... 7

United States v. Johnson, 268 U.S. 220 (1925) ..... 3

Wainwright v. Sykes, ..... U.S. ....., 53 L.Ed.2d 594, 97 S.Ct. ..... (1977) ..... 6, 7

### Other Authorities

U.S. Const. amend. XIV ..... 2, 3, 5, 8, 9

28 U.S.C. § 1257(3) ..... 1

§ 63.1-182, Code of Virginia (1950), as amended ..... 2, 7, 9

Rule 3A:4(c)(1), Rules of the Supreme Court of Virginia ..... 5

Rule 3A:7(a), Rules of the Supreme Court of Virginia ..... 5

Rule 3A:12(c)(1), Rules of the Supreme Court of Virginia ..... 6, 7

Rule 3A:12(d), Rules of the Supreme Court of Virginia ..... 6, 7

In The

# Supreme Court of the United States

October Term, 1977

No. 77-167

MILDRED WATTS,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

### OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The order rejecting the petition for a writ of error is set forth in the petitioner's petition for writ of certiorari on page 10.

### JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

I. **Whether The Refusal Of The Trial Court To Permit Dr. Harry E. Sutelan, Jr. To Testify Was A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution?**

II. **Whether The Refusal Of The Trial Court To Dismiss The Criminal Warrant For Lack Of Evidence And A Faulty Description Of The State Statute Was A Violation Of The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution?**

III. **Did The Trial Court's Conclusion, Before The Petitioner Offered Any Evidence, In Ruling On A Motion To Strike The Commonwealth's Evidence, That It Was Going To Continue The Case Generally For One Year, And Would Put The Petitioner In Jail For Contempt Of Court If She Had Individuals Living In Her Home Without A License And, Further, Would Impose The The Maximum Jail Time For Such A Violation, A Violation Of The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution?**

## STATEMENT OF THE CASE

The petitioner was tried by the court sitting without a jury on September 17, 1976, in the Circuit Court of the City of Norfolk on a charge of operating a rest home in the City of Norfolk in violation of § 63.1-182, Code of Virginia (1950), as amended.

The evidence adduced by the Commonwealth showed that on April 6, 1976, a Norfolk City Policeman was voluntarily admitted into the defendant's residence. Inside he observed five aged individuals who were not related to the defendant and who appeared to be living in the residence. Additionally, the officer testified that the front portion of the house had been converted into a church and contained approximately 15 to 17 church-type pews used for religious



ceremonies (Tr. p. 14). The officer also testified that the second floor of the residence contained approximately 15 beds (Tr. p. 14).

The record indicates that Hugh Ferrell, one of the individuals living with the defendant, testified that he was 85 years old; Lewis Westbrook, another resident, testified that he was 63; Luke Williams, a third resident, testified that he was 61 and Anne Fenk testified that she was 57.

It is to be noted that the defendant, in her own behalf, testified that she cooked meals and washed clothes for everyone in the house (Tr. p. 70), that residents were "admitted" to her home (Tr. pp. 82-84), and that Hugh Ferrell was "placed in her care" (Tr. p. 13).

## ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

I. **The Refusal Of The Trial Court To Permit Dr. Harry E. Sutelan, Jr. To Testify Is Purely A Matter Of State Law And Is Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.**

Initially, the Commonwealth submits that the only real questions that the petitioner raises in her petition turn on the particular facts of this case alone and are of interest only to the parties in it. In essence, it is submitted that the petitioner asks this Court to make another review of the trial record to see if it will decide this case in a manner different from that of the Circuit Court of the City of Norfolk and the Supreme Court of the Commonwealth of Virginia. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson,* 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings

of the court below, it is submitted, should be treated with and entitled to great weight. In the present case, the petitioner raises only questions turning entirely on the facts of this case, already resolved twice in favor of the respondent, without any impact outside the limits of this case. For this reason alone, it is submitted, certiorari should be denied.

The Commonwealth advances the position that the specific testimony of Dr. Sutelan was properly excluded as being irrelevant. The transcript reveals that Dr. Sutelan was asked if he examined Annie Fenk, Lewis Westbrook, Hugh Ferrell, Luke Williams, and Lena Goodman on May 13, 1976. The objection to that evidence was that this date was approximately one month after the date of the alleged offense. The trial court sustained the objection on the basis that the evidence was irrelevant to the condition of the named individuals on the date of the offense (Tr. pp. 100-102).

It is well settled that matters dealing with the admissibility of evidence and state law and procedure do not raise federal constitutional questions. *Grundler* v. *North Carolina,* 283 F.2d 798 (4th Cir. 1960); *Faust* v. *North Carolina,* 307 F.2d 869 (4th Cir. 1962); *Moore* v. *Illinois,* 408 U.S. 786, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972). The Commonwealth would note at this juncture that the petitioner did not make the argument that the refusal of the trial court to permit Dr. Sutelan to testify violated the due process clause of the United States Constitution to the Supreme Court of Virginia, nor was this issue raised at trial. Therefore, it is submitted that that issue is not properly before this Court and the petition of certiorari should be denied for this reason alone. *See Moore, supra,* at 716.



**II. The Refusal Of The Trial Court To Dismiss A Criminal Warrant For Lack Of Evidence And Faulty Description Of The State Statute Was Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.**

It appears that the thrust of the petitioner's question No. II is that the warrant issued in the case at bar was defective because it charged the petitioner with operating a rest home without a license and the statute allegedly violated prohibits the operation of a home for adults. The Commonwealth contends that the warrant complies fully with the form and content enunciated in the Rules of the Supreme Court of Virginia. Rule 3A:4(c)(1) provides:

> "The warrant shall [i] be directed to an appropriate officer or officers, [ii] name the accused or, if his name is unknown, set forth the description by which he can be identified with reasonable certainty, [iii] describe the offense charged, substantially as provided in Rule 3A:7(a), [iv] command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city or town in which the warrant was issued . . . ."

Rule 3A:7(a) provides:

> "The indictment or information shall be a plain, concise and definite written statement, (1) naming the accused, (2) describing the offense charged and citing the statute or ordinance that defines the offense or, if there is no defining statute or ordinance, prescribes the punishment for the offense, (3) identifying the county, city or town in which the accused committed the offense, and (4) reciting that the accused committed the offense on or about a certain date. In describing the offense, the indictment or information may use a name given to the offense by the common law, or the indictment or information may state so much of the common

law or statutory definition of the offense that it is sufficient to advise what offense is charged. Error in the citation of the statute or ordinance that defines the offense or prescribes the punishment therefor, or omission of the citation, shall not be ground for dismissal of an indictment or information, or for reversal of a conviction, unless the court finds that the error or omission prejudiced the accused in preparing his defense."

Rule 3A:12(c)(1) provides:

"Defenses and objections based on defects in the institution of the prosecution or in the written charge upon which the accused is to be tried, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion made within the time prescribed by paragraph (d) of this rule."

Rule 3A:12(d) provides that:

"A motion referred to in subparagraph (c)(1) shall be filed or made before a plea is entered and, in a court of record, at least 7 days before the date fixed for trial."

It is submitted that in the instant case the defendant, contrary to the provisions of Rules 3A:12(c)(1) and 3A:12(d), did not make a timely objection to the warrant. Further, the Commonwealth would point out that the petitioner has not alleged, at any stage, that the language of the warrant issued in the instant case prejudiced her in preparing her defense. *Cf. Gerstein* v. *Pugh,* 420 U.S. 54 (1975). Consequently, it is submitted that the petitioner has failed to comply with the procedural requirements for raising a proper objection to the warrant. In *Wainwright* v. *Sykes,* ..... U.S. ....., 53 L.Ed.2d 594, 97 S.Ct. ..... (1977), this Court held that, in a habeas corpus context, where a state procedural rule which, consistent with the United



States Constitution, required that a criminal defendant's confession be challenged at trial or not at all, was coupled with the defendant's failure to timely object to a confession's admission, this constituted an independent and adequate state procedural ground for rejecting the defendant's subsequent petition for habeas corpus, and this Court opined that it was prevented from direct review of the state court's decision. This Court opined that this result obtains because a state procedural rule which requires that a contemporaneous objection be made to the admission into evidence of a criminal defendant's confession deserves great respect from federal courts, because of the facts that it is a rule employed by a coordinate jurisdiction within the federal system and for the many interests it serves in its own right; it enables the record to be made with respect to the federal constitutional claim on the recollections of witnesses refreshed; and it enables the judge who observes the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question.

It is submitted that the requirements of Rules 3A:12(c)(1) and 3A:12(d) provide a "contemporaneous objection" requirement analogous to the one found in *Wainwright, supra.* Thus, the Commonwealth urges that the failure of the petitioner to comply with the procedural rule precludes review pursuant to the doctrine of *Wainwright.*

In addition to the failure of the trial court to dismiss the criminal warrant because of its alleged faulty description of § 63.1-182, Code of Virginia (1950), as amended, the petitioner in question No. II, alleges that the evidence adduced was insufficient to sustain the conviction. At the outset it is important to note that the standard for this Court is that the evidence should be viewed in the light most favorable to the state. *Cf., Glasser* v. *United States,* 315 U.S. 60, 80 (1941). In *Thompson* v. *Louisville,* 362 U.S. 199

(1960), and in *Garner* v. *Louisiana,* 368 U.S. 157 (1961), this Court recognized that the appropriate standard for the review of allegations of insufficient evidence to sustain the underlying conviction is "not on the sufficiency of the evidence, but rather [the] conviction rests upon any evidence at all." 362 U.S. 199; *accord, Garner* v. *Louisiana, supra* at 163; *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 94 (1965). The petitioner admits in her petition for a writ of certiorari that evidence was adduced by the Commonwealth that the petitioner was operating a home in violation of § 63.1-182, Code of Virginia (1950). Not only did officer Cameron testify that various persons not related to the defendant made her home their residence, several of the residents themselves testified that they lived with the petitioner and, further, testified as to their age. Thus, it is submitted that the "no evidence" test enunciated by Thompson was satisfied by the Commonwealth and the petition should be denied for that reason.

Again, it is to be noted that the due process issue raised by the petitioner in this question was not raised at trial and on appeal and, therefore, is not properly before this Court pursuant to *Moore, supra.*

**III. The Trial Court's Conclusion, Before Petitioner Offered Any Evidence, In Ruling On Her Motion To Strike The Commonwealth's Evidence, That It Was Going To Continue The Case Generally For One Year, Would Put Petitioner In Jail For Contempt Of Court If She Had People Living In Her Home And Had No License, And Would Impose The Maximum Jail Time Was Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.**

The Commonwealth submits that a review of the record of the trial of the petitioner clearly indicates that contrary to the petitioner's assertion in question No. III rather than the trial court ruling that it was going to continue the case



against the petitioner generally and fine her to the maximum if a violation of § 63.1-182 was discovered, the court merely proposed that alternative (Tr. pp. 63-65). When petitioner's counsel noted to the court that his motion to strike the Commonwealth's evidence had not been ruled on and that he had not put on any evidence on behalf of his client, the court, apparently, decided against the general continuance of the case and overruled the motion to strike and allowed petitioner to present her case (Tr. p. 65). Therefore, it is submitted that there was no Fourteenth Amendment violation. In fact, the actual sequence of events in the petitioner's trial progressed just as if the court had not "thought out loud" and made any mention of continuing the case.

Once again, it is submitted that the petitioner has raised the due process argument for the first time in this petition and it is, thus, not properly cognizable by this Court.

## CONCLUSION

The Commonwealth submits that for the foregoing reasons, this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

ANTHONY F. TROY
*Attorney General of Virginia*

ALAN KATZ
*Assistant Attorney General*

Supreme Court Building
Richmond, Virginia 23219

**CERTIFICATE OF SERVICE**

This is to certify that I, Alan Katz, Assistant Attorney General of Virginia, am a member of the Supreme Court of the United States and that on the 26th day of October, 1977, I mailed with first-class postage prepaid three true copies of this Respondent's Brief in Opposition to Grant of Certiorari to Howard I. Legum, Esquire, Fine, Fine, Legum & Fine, 720 Law Building, Norfolk, Virginia 23510.

ALAN KATZ
*Assistant Attorney General*